United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

No. 75-7600

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York, and on Remand from the Supreme Court of the United States

BRIEF FOR THE PERFORMING RIGHT SOCIETY LIMITED AND SOCIETE DES AUTEURS, COMPOSITEURS ET EDITEURS DE MUSIQUE AS *AMICI CURIAE*

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INDEX

	Page
I. INTEREST OF *AMICI CURIAE*	2
II. THE INTERNATIONAL SYSTEM FOR LICENSING OF MUSICAL PERFORMANCE RIGHTS	3
III. THE ESSENTIAL ROLE OF THE BLANKET LICENSE, AS RECOGNIZED BY THE SUPREME COURT'S DECISION IN THIS CASE, PRECLUDES A FINDING THAT IT CONSTITUTES AN UNREASONABLE RESTRAINT OF TRADE	5
IV. THE BLANKET LICENSE IS INDISPENSABLE TO THE INTERNATIONAL EXCHANGE OF MUSICAL PERFORMANCE RIGHTS	8
V. CBS' CONTENTION THAT THE BLANKET LICENSE OPERATES AS A PRACTICAL BARRIER TO THE DEVELOPMENT OF A SYSTEM OF DIRECT LICENSING IS CONTRARY TO THE FINDINGS OF THE DISTRICT COURT	11
CONCLUSION	14

TABLE OF AUTHORITIES

Cases:

Appalachian Coals, Inc. v. *United States*, 288 U.S. 344 (1933)	6
Chicago Board of Trade v. *United States*, 246 U.S. 231 (1918)	6
Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977)	6
Standard Oil Co. v. *United States*, 221 U.S. 1 (1911)	6

Miscellaneous:

Comment, *CBS* v. *ASCAP: Performing Rights Societies and the Per Se Rule*, 87 Yale L.J. 783 (1978)	10

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BRIEF FOR THE PERFORMING RIGHT SOCIETY LIMITED AND SOCIETE DES AUTEURS, COMPOSITEURS ET EDITEURS DE MUSIQUE AS *AMICI CURIAE*

The Performing Right Society Limited ("PRS") and Societe des Auteurs, Compositeurs et Editeurs de Musique ("SACEM") submit this brief as *amici curiae* urging affirmance of the judgment of the District Court.[1]

[1] All the parties have consented to the filing of this brief.

I.

INTEREST OF *AMICI CURIAE*

PRS is an association of composers, authors and publishers of musical works that was formed in the United Kingdom in 1914 to administer on behalf of its members certain of the rights provided by copyright legislation. A non-profit organization, it has more than nine thousand British members, and also represents composers and publishers in twenty-six other countries, formerly part of the British Commonwealth, that have no indigenous performing right societies.[2] PRS is affiliated on a reciprocal basis with similar organizations in thirty-seven countries, including the United States.

SACEM, established in 1851, is the world's oldest performing right organization. It has approximately 40,000 French members and represents composers and publishers in twenty-four other countries, formerly part of the French Empire, that have no performing right societies of their own. It is affiliated on a reciprocal basis with similar organizations in over thirty nations, including the United States.

The repertoires of PRS, SACEM, and their affiliates are made available for performance in the United States through affiliation agreements with ASCAP and BMI. Under these agreements, ASCAP and BMI obtain performance rights to different portions of the repertoires of PRS and SACEM for licensing to American users under the blanket license system. ASCAP and BMI represent the *amici's* members and affiliates, and protect

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[2] These countries are: Barbados, Bermuda, British Virgin Islands, Cayman Island, Cyprus, Gibraltar, Guyana, Hong Kong, Republic of Ireland, Jamaica, Kenya, Leeward Islands, Malawi, Malaysia, Malta, Mauritius, Nigeria, Pakistan, Seychelles, Singapore, Sri Lanka, Tanzania, Trinidad, Uganda, Windward Islands, and Zambia. Jamaican music, in particular, is widely played in the United States .

their rights against unauthorized performances in this country. Royalties are distributed in accordance with ASCAP's and BMI's usual rules and procedures governing royalty distribution.

Continued access to the American market, with full opportunity for performances on the television networks, is of great importance to PRS, SACEM, and their affiliates and members. For the year 1977, PRS received payments from ASCAP and BMI for performances of musical works in PRS' repertoire of about $3.3 million and $2.2 million, respectively, or a total of about $5.5 million.[3] In that year, SACEM received a total of approximately $1.2 million from ASCAP and BMI.[4] Payments from ASCAP and BMI accounted for about thirteen percent of PRS's 1977 gross revenues, and a smaller, but still significant, percentage of SACEM's 1977 gross revenues. A substantial portion of PRS' and SACEM's receipts from ASCAP and BMI represents royalties earned by the performance of their repertoires on the television networks under blanket licenses.

PRS and SACEM thus have a direct and substantial interest in the outcome of this case.

II.

THE INTERNATIONAL SYSTEM FOR LICENSING OF MUSICAL PERFORMANCE RIGHTS

The affiliation agreements among PRS, SACEM, ASCAP and BMI are part of a comprehensive framework of similar agreements among performing right

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[3] Reciprocally, PRS distributed a total of about $5.3 million to ASCAP and BMI, amounts due for the performance in the United Kingdom of works in their respective repertoires.

[4] In the same year, SACEM distributed a total of approximately $4 million to ASCAP and BMI for performance of their works in France.

organizations in nearly forty countries throughout the world. This international structure has been in place for over half a century, and provides a simple, efficient and equitable method by which foreign composers and publishers may have their works recognized and performed in the United States. Conversely, it also provides a fair and effective means for American composers and publishers to compete for recognition in the United Kingdom, France and other countries and have their works performed abroad.

The present system is the product of many years' experience in meeting the special needs and problems of international licensing of musical performance rights. Its economic and cultural benefits are immense. Economically, it establishes a worldwide market in which musical compositions freely and effectively compete, unfettered by national boundaries. Culturally, the "common market" for performance rights fosters an unobstructed flow, back and forth, of musical creativity throughout the world.

The linchpin of the international system for the licensing of musical performance rights is the blanket license that has been challenged in this case. Blanket licensing by ASCAP and BMI has made the musical repertoires of *amici* and their affiliates in nearly forty countries available in the United States to all the television networks and their vast audiences, as well as to countless television and radio stations, hotels, restaurants, concert halls, and a myriad of other users. It has been the vehicle for such valuable contributions to the American musical scene as those of PRS members Ralph Vaughan Williams, Benjamin Britten, the Beatles, the Rolling Stones and Elton John, and SACEM artists Michel Legrand, Olivier Messiaen, Dimitri Tiomkin, Jacques Brel and Edith Piaf. No alternative form of licensing could function as fairly and efficiently in making possible

a full and universally beneficial international exchange of performance rights.

If CBS were to succeed in its attempt to destroy the blanket licensing system, the calamitous effect would not be limited to the United States. It would leave an irreparable void in the world of music. CBS is here seeking to dismantle a system of licensing of musical performing rights that is international in scope and has equitably and efficiently promoted the progress of musical arts here and abroad.

III.

THE ESSENTIAL ROLE OF THE BLANKET LICENSE, AS RECOGNIZED BY THE SUPREME COURT'S DECISION IN THIS CASE, PRECLUDES A FINDING THAT IT CONSTITUTES AN UNREASONABLE RESTRAINT OF TRADE

The question now before the Court is whether the blanket license system, as applied to television networks, is an unreasonable or undue restraint of trade. The classic statement of the rule of reason was made by Mr. Justice Brandeis:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual and probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Chicago Board of Trade v. *United States*, 246 U.S. 231, 238 (1918). See also *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911); *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360-61 (1933); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

Any analysis of the reasonableness of the blanket license must begin with Mr. Justice White's opinion for the Supreme Court in this case. To be sure, the Supreme Court did not decide the rule of reason issue, because that issue was not presented to it. But in the course of deciding the question that was before it—namely, whether the blanket license is a per se violation of the Sherman Act—the Court discussed in some detail the history and purposes of the blanket license and the function it performs in the marketplace. These are the same factors that weigh so heavily in a rule of reason inquiry. The Supreme Court's specific and carefully reasoned findings on these critical matters compel, in our view, the conclusion that the blanket license, if it can be said to restrain trade at all, is certainly not an unreasonable restraint. That conclusion is *a fortiori* valid when the essential role of the blanket license is viewed, as we submit it must be, in the context of the worldwide system for licensing of musical performance rights.

The Supreme Court emphasized that the blanket license was not established as a "naked restraint" to stifle competition, but rather was a natural response to "the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions." 99 S. Ct. at 1562-63. The Court pointed out that the blanket license serves the needs not only of the owners of musical compositions but also the users, who "*want* unplanned, rapid and indemnified access to any and all of the repertory of compositions." *Id.* at 1563 (emphasis added). The costs that would be associated with the sale of individual licenses, as well as with

individual monitoring of the use of such licenses and individual enforcement of copyrights, would be enormous, and in many situations prohibitive. Moreover, "individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner." *Ibid.* Thus, the Court concluded, "[*a*] *middleman with a blanket license was an obvious necessity . . . .*" *Ibid.* (emphasis added).

Plainly, what the Supreme Court has held to be an "obvious necessity" cannot now be deemed an unreasonable restraint of trade. Even CBS no longer contends that all blanket licenses are unlawful. Rather, it argues that while blanket licenses may be justified for other users—restaurants, nightclubs, concert halls, perhaps even individual radio and television stations—it is not a legitimate method of licensing for television networks. But this issue was also addressed by the Supreme Court:

> With the advent of radio and television networks, market conditions changed, and the necessity for and advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public. But even for television networks, ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for. ASCAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses.

Id. (footnotes omitted).

To be sure, one member of the Court, Mr. Justice Stevens, while agreeing with the holding that the blanket license is not a species of price fixing forbidden *per se*, would have found the blanket license to be unlawful under the rule of reason. But no other Justice joined him in expressing that view. On the contrary, the eight members of the Court for whom Mr. Justice White wrote, while not directly deciding the rule of reason issue, clearly held that the blanket license is essential—in the Court's words, "an obvious necessity"—to the free exchange of musical performing rights. Their holding is utterly incompatible with a determination that the blanket license is an unreasonable restraint of trade.

IV.

THE BLANKET LICENSE IS INDISPENSABLE TO THE INTERNATIONAL EXCHANGE OF MUSICAL PERFORMANCE RIGHTS

The blanket license clearly plays an essential role in the *international* exchange of musical performing rights. Foreign composers and publishers would be placed at a substantial and unfair competitive disadvantage under either a system of direct licensing or a system of per use licensing through ASCAP and BMI.

Performance rights to many foreign compositions are held by music writers or publishers who have no American representative (except ASCAP or BMI). In such cases, the special problems of transoceanic negotiation—time-zone differentials, language barriers, and other added costs—would place enormous, probably insuperable, obstacles to network use of foreign music under a direct licensing scheme.[5] Moreover, even those composer. and

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[5] As an example, numerous television series or films currently exhibited or broadcast on CBS and the other networks contain musical scores composed by PRS and SACEM members who do not

publishers having agents in the United States could not make their musical works available at competitive rates while absorbing the expense of compensating such representatives for the additional burden of direct license negotiation with users. Agent fees already consume between twenty-five and fifty per cent of royalties accruing from an American performance and would doubtless rise still higher if direct negotiations were mandated.

In any direct negotiation or per use licensing scheme, the copyright owner (whether American or foreign) in determining a price would have to know when and how his music would be used, the nature of the program, size of the audience, whether it was daytime or prime time, etc. These and other factors affecting proper compensation under a direct licensing or per use scheme would have to be weighed for each of literally millions of compositions and would plainly add to the burden and expense. The complexity of setting fees under a per use scheme is enormously magnified where the copyright owner is foreign and the negotiations are international. The complications are obvious: Will the fee be standard for each composition in the repertory? Will it depend on the nature of the use? What other variables will affect the fee? Will ASCAP (or BMI) set the fee, or the members, or both? What role will the judiciary play if a fee is not agreed upon? These questions are glossed over by CBS, which seems to be wholly indifferent to the practical impact of a per use scheme on the international exchange of musical performance rights. The overriding benefit, indeed the *raison d'etre*, of the blanket license is that it obviates all such problems.

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have representation in this country. The networks have been authorized to perform these scores under their blanket licenses with ASCAP or BMI. Under a system of direct licensing, each use of the music in such series or films would require transoceanic negotiations with individual composers and publishers.

Nor would foreign copyright owners have a fair chance to compete under a per use licensing scheme of the type advocated by CBS. As CBS makes clear in its brief, the per use license would merely set a ceiling price on every musical composition, and in most cases users would seek competitive bids from copyright owners rather than pay the per use price established through ASCAP or BMI. Under this system, most performance rights—other than, perhaps, those for "music in the can"—would be granted under separate, individually negotiated licenses. The effect would be to place foreign copyright holders under essentially the same competitive disadvantage that they would be under if all performance rights were licensed individually. It is ironic that, in the name of competition, CBS is advocating a system that would effectively insulate the U.S. performance rights market against competition from foreign composers and publishers.

In the United States alone, there are over 80,000 composers and publishers holding copyrights in millions of musical works. PRS and SACEM together represent in excess of 50,000 foreign music writers and publishers whose copyrighted compositions also number in the millions. Licensed performances of music in the repertoire of ASCAP alone are estimated at more than 1 billion each year. Comment, *CBS* v. *ASCAP: Performing Rights Societies and the Per Se Rule*, 87 Yale L.J. 783, 786 (1978). Without the availability of blanket licensing, the costs of doing business in this vast and unusually complex market—collecting and disseminating information, negotiating licenses, and monitoring performances—would soar so high that the necessary functions could not be accomplished at all.

Patently, a system of direct individual or per use licensing would at best be grossly inefficient and at worst totally unworkable. It would have particularly disabling

effects upon the foreign performing right societies. An inevitable result would be to restrict the flow of musical works from foreign composers and publishers into the American market. PRS and SACEM strongly urge this Court to weigh the crippling injuries to the international structure for performance of music that would come from acceptance of CBS' position. The consequences of upholding its arguments are so far-reaching that a very heavy burden of persuasion surely rests on CBS. That burden clearly has not been met.

V.

CBS' CONTENTION THAT THE BLANKET LICENSE OPERATES AS A PRACTICAL BARRIER TO THE DEVELOPMENT OF A SYSTEM OF DIRECT LICENSING IS CONTRARY TO THE FINDINGS OF THE DISTRICT COURT

In the final analysis, the issue here is not whether per use licensing or individual licensing is desirable or practical, but whether the blanket license is unlawful. If the blanket license is lawful, ASCAP and BMI are free to continue to offer it, and they cannot be forced by a court to abandon it and adopt some other licensing system that CBS or other networks may prefer. In short, if (as we believe the Supreme Court's opinion, in effect, holds) the blanket license is not an unreasonable restraint of trade, the decision as to whether such a license should be utilized, r whether other forms of licensing should be established to replace or supplement the blanket license, is one to be made by the participants in the market, not by a court.

CBS' principal basis for arguing that the blanket license is unlawful is its claim that it operates as a barrier to the establishment of a direct licensing system. This contention, however, is one of fact, not of law. As

a legal matter, CBS or any other user has the right, if it so chooses, to refuse to enter into a blanket license and to seek instead direct licenses from copyright owners. That right, indeed, is protected by the consent decree. Thus, CBS is forced to argue that, as a matter of fact, it is prevented from obtaining direct licenses because the blanket license operates as a practical barrier to its doing so.

CBS makes numerous contentions in support of this position. We will refrain from refuting these contentions point by point, since we are certain that ASCAP and BMI will do so effectively in their briefs. There is, however, one overriding and conclusive response to all of CBS' arguments on this score—namely, that they were *all* rejected in the detailed and careful findings of fact of the District Court, which findings have already been upheld by this Court in its original decision. As the District Court stated in its "Summary of Findings":

> CBS has failed to prove that there are significant mechanical obstacles to direct licensing. Nor has it established by credible evidence that copyright owners would refuse to deal directly with CBS if it called upon them to do so. To the contrary, there is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license.
>
> Even assuming, contrary to the evidence, that many publishers and writers would initially adopt a wait-and-see attitude under a direct licensing system, it is clear on this record that any resistance they might manifest would quickly dissolve, and that CBS could easily fill its music needs in the meantime. The music industry is highly fragmented. There are over 3,500 publishers and many thousands of composers who are eager for exposure of their music, and well aware that their compositions are, with rare exceptions, highly interchangeable with others. In such

> circumstances, for direct licensing to fail CBS would have to be met with extraordinarily coherent resistance by publishers and composers. There is no basis in the record for the inference that such a coherent response is likely to occur.
>
> We are left with the strong impression that CBS has exaggerated the risks involved in dropping its blanket license and sought a legal solution to what is essentially a business problem.

CBS v. *ASCAP*, 400 F. Supp. at 779.

Once it is recognized that CBS is free, if it so desires, to refuse to utilize the blanket license and to negotiate direct licenses instead, all of its other arguments become irrelevant. CBS asserts that the blanket license is irrational, that it is discriminatory, that it forces the user to pay more for the performing rights it actually uses than would be paid under a direct licensing system. We believe, on the other hand, that a half century of experience throughout the world has established the blanket license as the most efficient, most equitable, and least costly method of licensing musical performing rights. But, as the District Court found, if CBS dislikes the blanket license, it is free to discontinue using it. If it wants to negotiate direct licenses with copyright owners, it is free to do so. Obviously, such a radical change in the method of doing business cannot be accomplished overnight; it requires planning, preparation, and transition. Again, as the District Court found, CBS could convert to direct licensing if it chose to do so, and the blanket license does not create any artificial barrier to its doing so. Mr. Justice White's opinion for the Supreme Court, referring to the finding of the District Court "that there was no legal, practical or conspiratorial impediment to CBS obtaining individual licenses," stated: "*CBS, in short, had a real choice.*" 99 S. Ct. at 1564 (emphasis added). In these circumstances, there is no basis for

holding that the blanket license constitutes an unreasonable restraint of trade. In the words of the District Court, CBS has in this case "sought a legal solution to what is essentially a business problem."

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

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Re: CBS v. ASCAP, et al.
No. 75-7600 (2d Cir.)

Dear Mr. Davidson:

I am writing you to request consent to the filing of an amici curiae brief in the Court of Appeals on behalf of the Performing Right Society Limited ("PRS") and Societe des Auteurs, Compositeurs et Editeurs de Musique ("SACEM"). As you will recall, PRS and SACEM filed an amici brief, with the consent of all parties, when the case was in the Supreme Court.

I would very much appreciate your signing below and returning this letter to me. I'm enclosing a copy for your files.

With thanks and good wishes,

Sincerely,

Philip Elman

Philip Elman

I consent to the filing of an amici curiae brief by PRS and SACEM.

George A. Davidson

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Attorney for BMI

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Re: CBS v. ASCAP, et al.
No. 75-7600 (2d Cir.)

Dear Mr. Topkis:

I am writing you to request consent to the filing of an amici curiae brief in the Court of Appeals on behalf of the Performing Right Society Limited ("PRS") and Societe des Auteurs, Compositeurs et Editeurs de Musique ("SACEM"). As you will recall, PRS and SACEM filed an amici brief, with the consent of all parties, when the case was in the Supreme Court.

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With thanks and good wishes,

Sincerely,

Philip Elman

Philip Elman

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October 22, 1979

Columbia Broadcasting System, Inc. v. ASCAP
Dkt. No. 75-7600 (2d Cir.)

Dear Mr. Elman:

CBS hereby consents to the request of your clients (The Performing Right Society Limited and Societe des Auteurs, Compositeurs et Editeurs de Musique) for permission to file a brief as amicus curiae in the above action on or before October 25, 1979.

Sincerely,

Roger H. Cummings

Philip Elman, Esq.,
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49A